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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Jorg Bernard

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DICKSTEIN SHAPIRO LLP
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NEW YORK, NY 10019

EXAMINER

BEKKER, KELLY JO

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

01/05/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/697,800	Applicant(s) BERNARD ET AL.	
	Examiner KELLY BEKKER	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 October 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 30-33,35-50 and 61 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 30-33,35-50 and 61 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>7/15/09</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicant's amendments made October 13, 2009 have been entered.
Claims 30-33, 35-50 and 61 remain pending.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 30-33, 35, 38-42, 44-47, and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barrett et al. (US 6531174 B2) in view of Koji et al. (JP 40119164A as translated by the USPTO May 2008). The references and rejection are incorporated herein and as cited in the office action mailed April 13, 2009. Specifically regarding the amendments to claim 30, the amendments recite limitations which are substantially the same as those recited in canceled claim 34, and thus are rejected for the same reasons that claim 34 was previously rejected.

Claims 36, 37, 43, 48, 50, and 61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barrett et al. (US 6531174 B2) in view of Koji et al. (JP 40119164A as translated by the USPTO May 2008), further in view of Willibald-Ettle et al. (US 6458400 B1). The references and rejection are incorporated herein and as cited in the office action mailed April 13, 2009.

Response to Arguments

Applicant's arguments filed October 13, 2009 have been fully considered but they are not persuasive.

Applicant argues that there is no teaching or suggestion by Barrett of the use of isomaltulose, that all of the examples in Barrett employ a single sweetener which is either sucrose or crystalline sucrose, that Barrett does not recognize a need for a crystalline and non-crystalline sweetener phase free of gelatin, and that Koji does not teach or suggest using a non-crystalline sweetener phase which is maltitol syrup or polydextrose or hydrogenated starch hydrolysate or a combination thereof in

Art Unit: 1794

combination with a crystalline phase which is isomaltulose together with a polysaccharide hydrocolloid to produce a gelatin free soft caramel.

Applicant's argument is not convincing as:

One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986);

The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, applicant's argument is not convincing; and

As stated in the previous office action, Barrett teaches of forming a gelatin free soft caramel (abstract) comprising polysaccharide hydrocolloids, including gum arabic and gellan gum (Column 2 lines 16-28), and preferably a crystalline sweetener phase including crystalline sucrose in combination with sugar replacement which is selected from the group including non-crystalline sweetener phases of maltitol and/or glucose syrup which is a starch hydrolysate (Column 4 lines 39-54, Column 5 lines 30-33, and Examples 1-3); Barrett is silent to the crystalline sweetener phase as isomaltulose, wherein isomaltulose is the only crystalline sugar in the composition; Koji teaches of a caramel composition which has improved taste, with little induction of dental caries, outstanding shapability and shape retentivity without the need for addition of sucrose, formed by incorporating palatinose, which is another name for isomaltulose (Abstract); thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to substitute isomaltulose for all of the sucrose, i.e. the crystalline sweetener phase, in the caramel composition as taught by Barrett in view of Koji; As Barrett teaches that all the sugar can be replaced with a sugar

Art Unit: 1794

replacers (Column 4 lines 45-48) and Koji teaches that isomaltulose is preferably the only crystalline sweetener in combination with a sugar syrup (page 6 lines 4-14), one would have been motivated to substitute isomaltulose for all of the sucrose, i.e. the non-crystalline sweetener phase, in the caramel composition in order to remove sucrose which is harmful to the dental needs of the consumer and to maximize the benefits of the isomaltulose, including the formation of an improved dental candy with improved taste and shape as taught by Koji.

Applicant argues that there are surprising and unexpected results because isomaltulose is not temperature stable. Applicant's argument is not convincing as the references of record teach of substantially the same product as instantly claimed and as the references of record teach of a product with isomaltulose at high temperatures and it would be expected that the products of the references would inherently be stable. Therefore, it is unclear as to what is unexpected about the temperature stability of the final product.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

Art Unit: 1794

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Kelly Bekker/
Examiner
Art Unit 1794

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1794